SAMSURI BAHARUDDIN & ORS A

v.

BORNEO SAMUDERA SDN BHD

HIGH COURT SABAH & SARAWAK, TAWAU B
RAVINTHRAN PARAMAGURU J
[ORIGINATING SUMMONS NO: T-24-45-2011]
9 SEPTEMBER 2013

ARBITRATION: *Award - Question of law - Reference under s. 42 Arbitration Act 2005 - Whether arose out of award by arbitrator - Questions of law never raised by parties when tribunal made decision - Whether court could determine questions of law* C

LAND LAW: *Ownership - Title to land - Draft native title - Whether has status of native title - Whether legal recognition provided to draft native title - Land Ordinance (Sabah Cap 68), ss. 4 & 88* D

LAND LAW: *Ownership - Dispute - Native title - Prohibition in dealing - Non-native prohibited from dealing with land held under native title - Exemption - Whether Minister empowered to grant exemption - Whether exemption sufficiently communicated - Whether dealings legal - Land Ordinance (Sabah Cap 68), ss. 17(1) & 64(1)* E

The dispute in this case arose between 813 smallholders of land ('the second to 814th plaintiffs') and the defendant. The first F
plaintiff, Samsuri Baharuddin, was the smallholders' attorney. The Sabah Land Development Board ('SLDB') entered into a development agreement with the smallholders, and a management agreement with the defendant in order to develop the land in Bagahak. Consequently, the smallholders entered into a joint G
venture agreement ('JVA') with the defendant to develop the lots into an integrated oil palm plantations. Under its terms, the smallholders were to surrender their interest in the lots in return for the Sabah Government re-alienating the lots to a JVA company in which the smallholders and the defendant would be H
allotted shares. Subsequently, the smallholders entered into sale and purchase agreements to sell their interest to one Siti Rahfizah binti Mihaldin and notified SLDB and the defendant of the transaction. Their demand for vacant possession of the lots and the account of income/profit generated was denied resulting in I
filing of court proceedings. However, the proceedings were stayed

and the dispute was referred to the arbitration. The tribunal, in its 'decision on preliminary issues', decided in favour of the defendant, *inter alia*, (i) that the disputed lots with draft native title never acquired the status of 'native title' and were therefore not native lots; (ii) even if the disputed lots were native lots, the approval of the Sabah State Cabinet and its due communication to the defendant's holding company was sufficient so as to comply with the exception to the prohibition on dealing found in s. 17(1) of the Land Ordinance (Sabah Cap 68) ('the Ordinance'); and (iii) the JVA and the JVA-powers of attorney issued in favour of the defendant were legal agreements. Dissatisfied with the decision of the tribunal, the plaintiffs referred to the court, questions of law under s. 42 of the Arbitration Act 2005 ('the Act'). The issues for the court's determination in this case were: (i) whether a 'draft native title' has a status of native title within the meaning of s. 4 read together with s. 88 of the Ordinance; (ii) whether a Minister could, under s. 17(1) of the Ordinance, permit a native to give power of attorney to a non-native to deal with land with native title or native customary right ('NCR'); and (iii) whether the arbitration tribunal had the jurisdiction to decide whether the second to 814th plaintiffs had acquired NCR.

Held (dismissing originating summons with costs):

(1) The decision of the tribunal was consonant with ss. 4 and 88 of the Ordinance which does not provide any recognition to unsigned 'draft titles'. Section 88 clearly provides legal recognition only to claims or titles that have been registered. The 'draft native titles' were all unsigned documents and had not been entered into the Native Title Register. In the absence of any case authority cited by the appellant, that an unsigned 'draft native title' has the same status as the properly issued title, it was impossible to see any error on the face of the award of the tribunal. (para 17)

(2) Section 64(1) of the Ordinance prohibits non-natives from dealing with land held under native title. However, s. 17(1) empowers the Minister of Natural Resources to grant exemption from the prohibition imposed by s. 64(1). The Sabah Cabinet chaired by the Chief Minister, who was also the Natural Resources Minister at the material time, gave approval for the JVA that provided for the giving of the power of attorney by the natives. As there was no prescribed form

to give approval in s. 17(1), the approval of the Sabah Cabinet was sufficient communication of the exemption. Hence, there was no error on the face of the decision of the tribunal in finding that the exemption had been granted. (paras 18, 19 & 20)

(3) It is trite that the question of law that is referred to the court under s. 42 of the Act should arise out of the award of the arbitrator. It was obvious that the question or the secondary questions pertaining to NCR did not arise out of the decision of the tribunal. The questions of law were never raised by the parties when the tribunal made its decision on preliminary issues but only ruled on the status of 'draft native title'. Hence, the court was precluded from determining the related questions of law under s. 42 of the Act. (para 21)

Case(s) referred to:
AJWA for Food Industries Co (Migop), Egypt v. Pacific Inter-Link Sdn Bhd & Another Appeal [2013] 2 CLJ 395 CA ***(refd)***
Ganda Edible Oils Sdn Bhd v. Transgrain BV [1987] 2 CLJ 394; [1987] CLJ (Rep) 95 SC ***(refd)***
Majlis Amanah Rakyat v. Kausar Corporation Sdn Bhd [2009] 1 LNS 1766 HC ***(refd)***

Legislation referred to:
Arbitration Act 2005, s. 42
Land Ordinance (Sabah Cap 68), ss. 4, 15, 17(1), 64(1), 88

Other source(s) referred to:
Halsbury's Laws of England, 4th Edn, p 334, para 623

For the plaintiffs - Christina Liew (Alex Decena & Azimi Yahya with her); M/s CJ Liew & Co
For the defendant - Ho Kin Kong; M/s Ho Chong Yong

Reported by S Barathi

JUDGMENT

Ravinthran Paramaguru J:

[1] This is an application *vide* originating summons to refer some questions of law to the High Court for determination under s. 42 of the Arbitration Act 2005.

Brief Background Facts

[2] The full background facts pertaining to this application are lengthy. They are well stated in the decision on preliminary issues by the arbitrator, Mr Michael Huang (the tribunal). I shall recapitulate the relevant background facts found in the decision on preliminary issues as follows. The dispute is between 813 smallholders of land and the defendant. The smallholders comprise the second to 814th plaintiffs. The first plaintiff, Samsuri Baharudin is their attorney. In 1977, the Sabah Government issued letter of offers to alienate 11,000 hectares of land in Bagahak to several thousand applicants. However, by 1993, most of the lots were not developed and the Chief Minister of Sabah directed the Sabah land development board (SLDB) to develop the area. In 1995, SLDB entered into a development agreement with the smallholders in question through one Tutik Garuda to develop the lots. In 1996, SLDB entered into a management agreement with the defendant to manage the Bagahak scheme. In 1998, the smallholders entered into joint venture agreement (JVA) with the defendant to develop the lots into an integrated oil palm plantation. Under its terms, the smallholders were to surrender their interests in the lots in return for the Sabah Government re-alienating the lots to a JVA company called Cemasjaya Bhd in which the smallholders and the defendant would be allotted shares. Later Bagahak Plantations Sdn Bhd (BPSB) became the vehicle of Cemasjaya Bhd to implement development of the lots. On 27 June 2005, an EGM was held for the winding up of Cemasjaya Bhd in the restructuring exercise whereby the shares, rights and interests of the smallholders were to be held in Ramapower Sdn Bhd and shares of the defendant were to be held in Rikaworth Sdn Bhd. On 20 June 2006, the smallholders, Cemasjaya, BPS, Ramapower, Rikaworth and the defendant entered into a share exchange agreement. The end result of this agreement was that BPSB issued 71% of its shares to Rikaworth (controlled by the defendant) and 29% of its shares to Ramapower (controlled by the smallholders). On separate dates between 17 December 2005 and 25 July 2006, the 813 smallholders in question sold their interests to one Siti Rahfizah binti Mihaldin *vide* 813 sale and purchase agreements (the SPAs). The smallholders also granted five power of attorneys to the first plaintiff "to commence or defend action in court or proceeding and appear before a Government officer, tribunal, board of committee and or any other body in all matters relating to the land mentioned".

Dispute

[3] On 8 March 2006, the plaintiffs notified the SLDB and the defendant of the SPAs and demanded vacant possession of their lots and an account of income/profit generated. Upon denial of their claims, the plaintiffs filed Suit No: T22-41-2007 and Suit No: T22-42-2007. Pursuant to court order dated 25 February 2008, the court proceedings were stayed and the dispute was referred to arbitration. The parties then agreed to stay suit T22-42-2007 as well pending arbitration.

Preliminary Decision Of The Tribunal

[4] The arbitration is still ongoing. The instant application is in respect of the decision on preliminary issues of the tribunal which is dated 13 May 2011. The said issues were framed by the tribunal after consultation with the parties. Among the issues determined by the tribunal are as follows:

1. (i) Is the JVA an illegal agreement by virtue of Sections 4 and 17(1) of the Sabah Land Ordinance ("Land Ordinance") read with Section 24 of the Contracts Act 1950?

   (ii) If so, what effect would it have on the validity and enforceability of the JVA, if any?

2. (i) Are the Powers of Attorney set out in Annex 16.1 of the Claimant's Statement of Case illegal agreements in contravention of Section 64.2 read with Sections 4 and 17.1 of the Land Ordinance and Section 24 of the Contracts Act 1950?

   (ii) If so, what effect would it have on the validity and enforceability of the JVA, if any?

3. If the JVA is illegal, ineffective, unenforceable or void *ab initio* for whatever reasons, has any proprietary interest in the 813 Lots passed in law to Cemasjaya and/or BPSB?

[5] The tribunal found that the disputed lots with draft native title never acquired the status of "Native Title" and were therefore not native lots. The tribunal also found that even if the disputed lots were native lots, the approval of the Sabah State Cabinet and its due communication to the defendant's holding company almost a year before the first JVA-Power of Attorney was executed was sufficient so as to comply with the exception to the

A prohibition on dealing found in s. 17(1) of the Sabah Land Ordinance (Cap 68). The tribunal then found that the JVA and the JVA-Powers of Attorney issued in favour of the defendant are legal agreements.

B **Reference Under S. 42**

[6] The plaintiffs were dissatisfied with the decision of the tribunal and referred the following four questions of law under s. 42 of the Arbitration Act 2005:

C (a) What is the difference in law between a Draft Native Title and an entry in the Field Register?

(b) Is an entry in the Field Registry a Native title within the meaning of s. 4 read together with s. 88 of the Sabah Land Ordinance?

D

(c) Is a Draft Native Title a Native Title within the meaning of s. 4 read together with s. 88 of the Sabah Land Ordinance?

(d) What is the true legal nature of a Draft Native Title?

E **[7]** The plaintiffs then referred a further question by way of amendment for the determination of the court, ie.

Whether section 64(2) of the Land Ordinance prohibits a native from giving a Power of Attorney to a non-native to deal with land with Native Title or Native Customary Rights and whether a Minister under section 17(1) permit a native to give a Power of Attorney to a non-native to deal with land with Native Title or Native Customary Right.

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[8] At the eleventh hour, the plaintiffs again added further G questions in respect of the jurisdiction of the tribunal *vis-á-vis* native customary rights:

1. Does the Tribunal have jurisdiction to determine whether the Applicants have acquired NCR under section 15 of the Land Ordinance?

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2. Even if the Tribunal has jurisdiction to determine the Applicants' claims of NCR, can such rights be disposed summarily in a hearing on Preliminary Issues?

3. In finding that the Draft Native Titles did not amount to a I Native Title with the meaning of the Sabah Land Ordinance, has the Tribunal in its Decision considered the Applicants pleaded case that they have acquired NCR under section 15 of the Land Ordinance?

Decision

[9] In my opinion, all the above questions can be reduced to only three broad questions, ie:

1. Is a Draft Native Title a Native Title within the meaning of section 4 read together with section 88 of the Sabah Land Ordinance?

2. Can a Minister under section 17(1) permit a native to give a power of attorney to a non-native to deal with land with Native Title or Native Customary Rights?

3. Whether the arbitration tribunal has jurisdiction to decide whether the 2nd to 814th plaintiffs have acquired NCR?

[10] There is no doubt that the tribunal had answered the first two questions in favour of the defendant and hence this application by the plaintiffs.

[11] Section 42 of the Arbitration Act 2005 reads as follows:

(1) Any party may refer to the High Court any question of law arising out of an award.

(1A) The High Court shall dismiss a reference made under subsection (1) unless the question of law substantially affects the rights of one or more of the parties.

[12] At the outset, I am of the view that counsel for defendant correctly referred the court to a number of recent decisions that espouse a policy of non interference in arbitration awards save in instances where there is an error on the face of the award or patent injustice (see *AJWA for Food Industries Co (Migop), Egypt v. Pacific Inter-Link Sdn Bhd & Another Appeal* [2013] 2 CLJ 395 and *Majlis Amanah Rakyat v. Kausar Corporation Sdn Bhd* [2009] 1 LNS 1766). In respect of reference to the court under s. 42 of the Arbitration Act 2005, Mohamad Ariff Md Yusof J in *Majlis Amanah Rakyat v. Kausar Corporation Sdn Bhd* (*supra*), said as follows:

> A question of law must arise out of an award and not out of the arbitration. As such, the jurisdiction conferred on the court should be a limited one, more in line with the jurisprudence on error of law on the face of the award.

[13] I shall now proceed to examine the questions of law referred to the court. The first question is simply whether the draft titles have the status of native titles. The tribunal's decision is that the draft native titles are not native titles under the Sabah Land Ordinance (Cap 68). The tribunal considered ss. 4 and 88 of the Ordinance. The definition of title in s. 4 is as follows:

> "title" means any Lease, Provisional Lease, or entry in the Native Title Register or in the Field Register issued under the provisions of this Ordinance;

[14] Section 88 reads as follows:

> 88. No title or claim to land valid unless registered
>
> No new title and no dealing with, claim to or interest in any land except land still held under native customary tenure without documentary title shall be valid until it has been registered in accordance with the provisions of this Part.

[15] The director of the lands and surveys department said in his witness statement that the "draft titles" were merely "administrative". Although the land had been surveyed, they were unsigned and there was no entry into the Register. On the other hand, Field Register titles are titles which are not demarcated by survey but had been signed and entered into the Register. The tribunal then proceeded to hold that the "draft native titles" are not "native titles" and therefore the disputed lots never acquired the status of "native titles". The tribunal's reasoning is as follows. Section 4 only recognises two means for land to acquire the status of native title, ie, through being entered in the native title Register or in the Field Register. In the instant case, there is no evidence to show that the draft titles were registered in the native title Register. Furthermore, the tribunal also noted that "draft title" is not provided in the Sabah Land Ordinance (Cap 68). Finally, the tribunal considered the effect of s. 88 that enacts that registration is a condition precedent for the recognition of any interest in land.

[16] The preponderant view expressed in the authorities cited by counsel for respondent is that interference with the award of an arbitrator is only justified in rare and exceptional cases where there is injustice, illegality or error on the face of the award. Even in cases involving questions of law or construction, the court is

not entitled to set aside the award of the arbitrator merely because it would have reached a different conclusion. In *Ganda Edible Oils Sdn Bhd v. Transgrain BV* [1987] 2 CLJ 394; [1987] CLJ (Rep) 95, the Supreme Court adopted the following principles from *Halsbury's Laws of England*, 4th edn., p. 334, para. 623:

> ... and where the question referred for arbitration is a question of construction, which is, generally speaking, a question of law, the arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion; but if it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award.

[17] In the instant case, I do not see any reason to hold that the decision of the arbitral tribunal is wrong on the face of the award. To my mind the decision is consonant with the ss. 4 and 88 of the Sabah Land Ordinance (Cap 68). As noted by the tribunal, the "draft native titles" were all unsigned documents. The Sabah Land Ordinance (Cap 68) does not provide any recognition to unsigned "draft titles". They had not been entered into the native title Register. Section 88 clearly provides legal recognition only to claims or titles that have been registered. Furthermore, counsel for appellant has not cited any case authority that states that an unsigned "draft native title" has the same status as a properly issued title. In the premises, it is impossible to see any error on the face of the award of the tribunal.

[18] In view of my decision on the first question, strictly speaking, it is unnecessary for me to consider the second question, ie, whether the Minister under s. 17(1) can permit a native to give a power of attorney to a non-native to deal with land with native title or native customary rights. However, I shall proceed to consider the question for sake of completeness. In my view, the second part of the question pertaining to native customary rights is not a question that arises out of the decision on preliminary issues. The question whether native customary rights had been acquired on the land was not an issue framed for the decision of the tribunal. Therefore it is not a question that arises out of the

arbitration award. In respect of the remaining question, ie, whether the Minister under s. 17(1) can permit a native to give a power of attorney to a non-native to deal with native title, I see no reason to interfere with the finding of the tribunal. Section 64(1) of the Sabah Land Ordinance (Cap 68) prohibits non-natives from dealing with land held under native title. It reads as follows:

> 64. Application limited to lands held by natives
>
> (1) This Part shall apply only to lands held by natives, and no non-native may purchase any land held under this Part, unless in accordance with the terms of section 17, or acquire any interest therein by way of charge or otherwise.

[19] Under s. 17(1) the Minister of Natural Resources is empowered to grant an exemption from the prohibition imposed by s. 64(1). Section 17(1) reads as follows:

> 17. Land dealings with natives
>
> (1) Except with the written permission of the Minister all dealings in land between non-natives on the one hand and natives on the other hand are hereby expressly forbidden and no such dealings shall be valid or shall be recognised in any court of law unless they shall have been entered into and concluded before the 16th day of January, 1883, or in the terms of the next following clause.

[20] The tribunal decided the question in the affirmative based on the following evidence. The Sabah Cabinet chaired by Chief Minister gave approval for the JVA in question that provided for the giving of Power of Attorney by the natives. The Chief Minister at the material time was also the Natural Resources Minister. The approval was termed "conditional". However the approval was in reality a final decision as the JVA was signed in 1998 following the approval of the Sabah Cabinet as found by the tribunal. The tribunal also noted that there is no prescribed form to give approval in s. 17(1) and therefore the approval of the Sabah Cabinet chaired by the Chief Minister was sufficient communication of the exemption. Again, I cannot say that there is any error on the face of the decision of the tribunal. The Minister of Natural Resources is empowered to grant exemption under s. 17 and on the evidence, the tribunal found that such exemption had been granted.

[21] The third question is whether the tribunal has jurisdiction to decide whether the second to 814th plaintiffs have acquired native customary rights over the lots in question. In my view, the application to determine the above question should be dismissed outright. It is trite law that the question of law that is referred to the court under s. 42 of the Arbitration Act 2005 should arise out of the award of the arbitrator. It is obvious that the above question or the secondary questions pertaining to native customary rights did not arise out of the decision of the tribunal. Questions of law pertaining to native customary rights were never raised by the parties when the tribunal made its decision on preliminary issues. The tribunal only ruled on the status of "draft native title". Native customary rights is a totally different category of land. Land held under native customary rights is untitled land which is accorded recognition by the collector under s. 15 of the Sabah Land Ordinance (Cap 68). On the other hand, as discussed earlier, land held under native title is titled land issued under the Sabah Land Ordinance (Cap 68) and entered into the native register. In the premises, as issues pertaining to native customary rights did not arise out of the award of the tribunal, this court is precluded from determining the related questions of law under s. 42 of the Arbitration Act 2005.

[22] For all the above reasons, I find no reason to interfere with the decision of the tribunal. I shall dismiss the originating summons with costs of RM5,000.